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 Defendant, *pro se*

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

COUPONS, INC., a California corporation,)	Case No.: 5:07-cv-03457-HRL
Plaintiff,)	
vs.)	REPLY TO HOLLIS BETH HIRE AND
)	WILSON SONSINI GOODRICH &
)	ROSATI'S OPPOSITON TO
JOHN STOTTMIRE, and DOES 1-10,)	DEFENDANT'S MOTION FOR
)	SANCTIONS
Defendant)	
)	Courtroom: 2, 5 th Floor
)	Judge: Hon. Howard R. Lloyd

Pursuant to Civil Local Rule 7-3(c) defendant John Stottlemire ("Defendant") submits this reply to Plaintiff Coupons, Inc.'s and Hollis Beth Hire and Wilson Sonsini Goodrich & Rosati's (Collectively "CI") Opposition to Defendant's Motion for Sanctions Pursuant to Rule 11 of the Federal Rules of Civil Procedure.

REPLY TO OPPOSITION TO DEFENDANT'S MOTION FOR SANCTIONS

INTRODUCTION

CI attempts to justify filing of its First Amended Complaint ("FAC") by stating the FAC is "well-grounded in law and fact and reflects a thorough pre-filing investigation by counsel" (Opposition at 1) which simply is not true. CI does so by throwing out the very definition of circumvention, an act done "without the authority of the copyright holder" 17 U.S.C. § 1201(a)(3)(a) as well as the illusion that CI's software somehow protects an exclusive right guaranteed the copyright holder. Further, CI makes claims in its Opposition which, as well, Reply to Hollis Beth Hire and Wilson Sonsini Goodrich & Rosati's Opposition to Defendant's Motion for Sanctions
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1 simply are not true. As an example, CI states a “notice of withdrawal...has been filed in this
2 matter” (Opposition at 1) when no notice of withdrawal currently exists in the docket. CI also
3 states that *Chamberlain Group, Inc. v. Skylink Techs, Inc.*, 381 F.3d 1178 (Fed Cir 2004) is not
4 controlling authority for this District Court and while this may be true, this District Court’s sister
5 District, The Central District of California, Western District relied heavily on *Chamberlain* in its
6 recent ruling in *Ticketmaster LLC, v. RMG Technologies*, 2007 U.S. Dist Lexis 78427 (C.D. CA.
7 Filed October 16, 2007) and used it exclusively to determine the elements a plaintiff must prove
8 to establish a *prima facie* case against a defendant. CI further proclaims that Defendant
9 “erroneously refers to Hollis Beth Hire as lead counsel” (Opposition at 7) however, close
10 examination of the Court’s own ECF website shows Hollis Beth Hire as lead counsel and Hollis
11 Beth Hire signed both CI’s original Complaint and CI’s First Amended Complaint. CI also
12 opposes by stating that Defendant “argues that the allegations in the FAC are “false” and
13 “misleading” because...(2) which has been circumvented, such that that third parties can now
14 access the work without authorization.” (Opposition at 8) however, Defendant actually argues
15 that Defendant did not circumvent within the meaning of 17 U.S.C. 1201(a)(3)(a) (Motion for
16 Sanctions at 8) and makes no mention of third party access, authorized or not. These small
17 inconsistencies when taken one at a time mean very little, however, when added together and
18 combined with Defendant’s argument that CI’s FAC makes misleading and false allegations they
19 further support Defendant’s position.

20 CI’s FAC is replete with false and misleading allegations. Collectively, the Oppositions
21 filed by CI are replete with false and misleading facts. Not a single document has CI filed with
22 this Court which is a fair description of the facts which surround this case. After transferring
23 complete ownership of its software, CI has some unfounded notion that it still controls the
24 software in some manner and can prohibit consumers who own the software from using that
25 software as they wish. They further contend that hidden files and registry keys are a
26 technological measure and it requires a great deal of technological expertise to locate and delete
27 them. This is tantamount to claiming a hidden open door controls access to a building. CI
28 requires an extension of existing law in order to pursue this action under 17 U.S.C. 1201 *et seq*
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1 (“DMCA”) and the law suit is frivolous. While making all of these claims, CI’s software and
2 CI’s website contain no End User Licensing Agreement or Terms of Use which would easily
3 place restrictions on consumers.

4 For all of these reasons, Plaintiff, Coupons Inc and its attorney Hollis Hire should be
5 sanctioned for violating, at a minimum, Rule 11 of the Federal Rules of Civil Procedure.

7 **ARGUMENT**

8 While CI contends its investigation prior to filing the FAC was more than reasonable, CI
9 obviously did not test its software against the requirements of the DMCA.

10 The basic elements of the DMCA are clear. A plaintiff seeking relief under 1201(a)(2)
11 must establish five basic elements before defendant’s actions can be tested for trafficking. These
12 elements are 1) ownership of a valid copyright on a work protected under the Copyright Act; 2)
13 effectively controlled by a technological measure which has been circumvented; 3) that third
14 parties can now access; 4) without authorization, in a manner that 5) infringes or facilitates
15 infringing a right protected by the Copyright Act. *Chamberlain Group, Inc. v. Skylink Tech.*, 381
16 F.3d 1178 at 1203 (Fed Cir 2004).

17 CI fails to see that there are two forms of withheld authorization which are required.
18 First, CI must establish that the alleged act of circumvention was unauthorized (*See Id* at 1193,
19 “defines circumvention as an activity undertaken without the authority of the copyright owner”)
20 and second, CI must establish that third parties can now access CI’s works without authorization
21 (*See Id* at 1204, “a property right for which the Copyright Act permits the copyright owner to
22 withhold authorization—as well as notice that authorization was withheld”).

23 CI attempts to rid the DMCA of this basic requirement by blurring the lines between the
24 definition of circumvention and the fact that it must withhold authorization to a right for which
25 the Copyright Act permits. CI opposes by stating Defendant misunderstands the DMCA and
26 misapplied the elements established in *Chamberlain.*, CI’s misplaced construct of the DMCA is
27 required by the CI to justify the action now pending against Defendant.

1 CI further opposes by stating its software effectively controls access to its works which
2 are protected by copyright and does so by ignoring existing case law. Although Defendant relies
3 on *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004)
4 for an analogy the conclusion would be universal “just as one would not say that a lock on any
5 door of a house controls access to the house after its purchaser receives the key to the lock...”
6 CI admits that it relies on hiding the unique IDs to control access to its coupons. “the
7 technological expertise required to identify and locate the unique [IDs]...” (Weitzman Decl 9)
8 and CI’s opposition is based upon the difficulty it takes to locate and delete. First, hiding the
9 lock used in the *Lexmark* Court’s analogy would not change the fact that the lock does not
10 control access to the house after the purchaser receives the key. The purchaser need only locate
11 the lock. Second, the level of difficulty one faces when erasing a file or registry key is non-
12 existent. It is safe to assume that everyone who owns a computer knows how to push the delete
13 button on the keyboard and knows what that button does. Saying that deleting these files and
14 registry keys is difficult and requires a high level of technological expertise is comical.

15 The DMCA does not require a technological measure to be impenetrable, or the DMCA
16 would not need to exist. However, the DMCA does require that the technological measure
17 actually be a technological measure. Hiding files and registry keys on a consumer’s computer
18 with the hopes that those files and registry keys will not be found and deleted cannot qualify as a
19 technological measure.

20 Lastly, the CI opposes by stating Defendant has violated 17 U.S.C. 1201(b)(1) and that
21 Defendant has not even addressed this section of the DMCA. While true, the Defendant has not
22 addressed 17 U.S.C. 1201(b)(1), this is done with reason. For CI to claim Defendant has
23 violated 1201(b)(1) CI would have had to deploy a technological measure which permits access
24 but prohibits copying (or another right granted exclusively to the copyright holder).

25 CI’s software does not permit access and then prohibit copying; CI’s FAC makes no such
26 claim. CI’s FAC supports this: “the coupon is sent directly to the consumer’s printer” (FAC §
27 14). CI’s FAC does not claim the digital files sent by CI to the consumers have been tampered
28 with in any way, whereby allowing the consumer to save the digital file to their hard drive or
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1 allowing the consumer to view the coupon directly on the monitor. CI cannot now claim that a
2 technological measure has been circumvented without its FAC claiming that copyright
3 infringement could or did occur and therefore cannot now claim that Defendant is in violation of
4 17 U.S.C. 1201(b)(1).

5 **CONCLUSION**

6 CI opposes by saying it filed its FAC after ample investigation and research, however, CI
7 apparently forgot one very important aspect of that investigation: to test its own software against
8 the elements of the DMCA. All in all, as argued in Defendant's Motion for Summary Judgment,
9 CI's software fails on all five of the elements needed to prove a prima facie case against the
10 Defendant. CI has filed this action with the court with the knowledge that Defendant did not
11 circumvent CI's software and such a filing is both frivolous and for improper cause. Defendant
12 owned the software and can do anything with that software he wishes; Defendant was not merely
13 a licensed user of the software.

14 For all of the above reasons, Defendant's Motion for Sanctions Pursuant to Rule 11 of the
15 Federal Rules of Civil Procedure must be granted.

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18
19 Dated: November 20, 2007

/s/

John Stottlemire, *pro se*